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No. 10-1173

IN THE
Supreme Court of the United States

SERGEANTS BENEVOLENT ASSOCIATION HEALTH AND WELFARE FUND, ON BEHALF OF THEMSELVES AND OTHERS SIMILARLY SITUATED, ET AL.,

Petitioners,

v.

ELI LILLY AND COMPANY

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioners' "excess price" theory was too attenuated to establish proximate causation under the Racketeer Influenced and Corrupt Organizations Act, where the conduct that directly caused the alleged injury—respondent's pricing of its prescription drug Zyprexa—was distinct from the alleged predicate acts—mail fraud based on misrepresentations to physicians regarding Zyprexa.

2. Whether this Court should hold the petition pending resolution of *Erica P. John Fund, Inc. v. Halliburton Co.*, No. 09-1403 (argued Apr. 25, 2011).

RULE 29.6 STATEMENT

Respondent Eli Lilly and Company states that it has no parent corporation and that no publicly held corporation owns 10 percent or more of its stock.

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BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Second Circuit (App. 1a-30a) is reported at 620 F.3d 121. The district court's memorandum and order denying respondent's motion for summary judgment (App. 382a-397a) is reported at 493 F. Supp. 2d 571. The district court's memorandum and order granting in part and denying in part petitioner's motion for class certification (App. 31a-381a) is reported at 253 F.R.D. 69.

JURISDICTION

The Second Circuit entered judgment on September 10, 2010, and denied a petition for rehearing on November 12, 2010. App. 398a. On February 1, 2011, Justice Ginsburg extended the time to file a petition for a writ of certiorari to March 25, 2011. App. 402a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT

In this case, the district court certified a class of thousands of "third party payors" ("TPPs") seeking to recover alleged overpayments for the antipsychotic medication Zyprexa. The TPPs alleged that respondent Eli Lilly and Company ("Lilly") induced physicians to prescribe Zyprexa by making false statements about its safety and efficacy. The district court denied summary judgment and certified a class despite finding that: (1) a physician's decision to prescribe a particular antipsychotic medication for a

patient is a complex and individualized determination; (ii) many physicians were not misled by Lilly's alleged misstatements; (iii) the price of Zyprexa did not go down at all after the alleged misstatements were revealed; and (iv) TPPs have continued to pay for Zyprexa. On interlocutory appeal, the court of appeals held that plaintiffs' claims required individualized proof, and therefore the case was not appropriate for class certification. In addition, the court of appeals held that Lilly was entitled to summary judgment on one of the TPPs' two theories of liability. The court of appeals remanded to the district court for consideration of whether plaintiffs' other theory is viable.

A. TPP's Payments For Zyprexa

Zyprexa is one of a class of medications known as second-generation antipsychotics ("SGAs"). App. 2a. The Food and Drug Administration has approved Zyprexa for treatment of schizophrenia and short-term treatment of acute manic episodes associated with bipolar I disorder and maintenance treatment of bipolar disorder. *Id.* As the district court found, "[t]here is a general consensus that [Zyprexa] is useful for both FDA-approved indications and some off-label purposes." App. 37a. Zyprexa has "substantially increased the quality of life of some sufferers from severe mental problems." *Id.* (citing Elyn R. Saks, *The Center Cannot Hold: My Journey Through Madness* 303 (2008) ("I began to take Zyprexa . . . . The change was fast and dramatic . . . . The clinical result was, not to overstate it, like daylight dawning after a long night.")).

Although petitioners assert that Zyprexa is "no more efficacious or safe than comparable antipsychotics," a large study funded by the National Institute of Mental Health found that Zyprexa was "the most effective drug" measured by the "principal outcome variable" of the study, which was "the time to discontinuation of medication for any reason." Robert Freedman, *The Choice of Antipsychotic Drugs for Schizophrenia*, 353 New Eng. J. Med. 1286, 1287 (Sept. 22, 2005) (discussing results of CATIE study). As a result, notwithstanding petitioners' allegations in this case, "[e]ven now, TPPs pay for Zyprexa and for the most part have not implemented close control or review of Zyprexa prescriptions." App. 27a-28a.

A pharmaceutical company sets an initial price for a prescription drug such as Zyprexa based on a variety of factors. App. 6a-7a. The "price does not respond to market demand," App. 6a, because demand is determined by physicians' prescribing decisions and "[p]hysicians generally do not take the price of a drug into account when deciding among treatment options, and often do not even know the price of the drugs they prescribed," App. 8a.

The price set by a manufacturer, however, is not necessarily the price paid by a particular TPP. Instead, a TPP's price is often the result of price negotiations between the TPP's Pharmacy Benefit Manager ("PBM") and the manufacturer. App 8a. PBMs are sophisticated entities that "manage approximately seventy-five percent of all outpatient drug claims." App. 8a. They offer "expertise in the management of pharmacy benefits, providing services such as formulary development, negotiations with pharmaceutical companies, rebate

management, and claims processing." App. 203a. PBMs are "the 800-pound gorillas of pharmaceutical reimbursement"; they "exert a major influence on the economics of the pharmaceutical industry." *Id.* (internal quotation marks and citation omitted).

PBMs do not place drugs on their formularies unless they are approved by the PBM's Pharmacy and Therapeutics ("P & T") Committee, which is "made up of physicians and clinical pharmacists." App. 8a. The "primary focus" of P & T Committees is on "rebates and economic efficiency." App. 204a. As the district court explained, "the people who put the drugs on formularies are paid for screening them .... They're responsible and getting paid to know." C.A. App. A1346.[1]

B. Petitioners' RICO Claims

Petitioners are insurance companies and unions that pay for prescription drugs on behalf of their insureds or members. App. 1a-2a. In 2005, petitioners brought a putative class action against respondent Lilly. App. 13a. Petitioners alleged, among other claims, a violation of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 *et seq.* ("RICO"), predicated on mail fraud. *Id.* Petitioners' RICO claim was based on allegations that Lilly made false statements and omitted material information concerning the safety and

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[1] Petitioners' amici purport to describe the economic structure of the pharmaceutical industry, but largely ignore the role of PBMs and P & T Committees. *See* Brief of Dr. Brian C. Becker *et al.* as *amici curiae* at 6-11.

efficacy of Zyprexa, and that these misrepresentations "resulted in a higher price and greater demand for Zyprexa than would have existed had accurate information about Zyprexa's efficacy and risks been known." *Id.*

Petitioners asserted two theories to explain how they were injured by Lilly's alleged misrepresentations. App. 13a-14a. *First*, petitioners alleged that Lilly's improper promotion of Zyprexa caused physicians to prescribe Zyprexa more frequently than they otherwise would have. *Id.* Under this "quantity effect" theory, petitioners alleged that they were injured because they paid for a greater number of Zyprexa prescriptions than they would have absent the alleged fraud. *Id. Second*, petitioners alleged that, by promoting Zyprexa improperly, Lilly was able to sell the drug at a higher price than it otherwise could have. App. 14a. Under this "excess price" theory, petitioners were injured every time they paid for a prescription of Zyprexa, even if the prescription was written by a physician who was not misled by the alleged misrepresentations for a patient who benefited from the medication. *Id.*

C. The District Court's Decisions

1 Lilly moved for summary judgment, arguing that petitioners could not establish the causation and injury elements of a fraud-based civil RICO claim because they had identified no physicians who would not have prescribed Zyprexa but for the alleged fraud. App. 15a. Characterizing petitioners' claims as "overpricing" claims, the district court denied the motion. *Id.*; App. 382a-397a.

Judge Weinstein held that petitioners could prove causation based solely on aggregate, statistical proof because Lilly's alleged fraud was a "broad-based" scheme that was intended to "'distort[] the general body of knowledge about Zyprexa.'" App. 15a. In reaching this conclusion, the district court relied on its own decision in *Schwab v. Philip Morris USA, Inc.*, 449 F. Supp. 2d 992 (E.D.N.Y. 2006), which was later reversed by the Second Circuit. *See McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215 (2d Cir. 2008).

2. Relying solely on generalized evidence, petitioners moved for class certification. During the class certification hearing, petitioners abandoned the argument that a class could be certified based on the quantity effect theory because, under this approach, they admittedly would "end up in a situation like *McLaughlin*" where individualized evidence would be required. C.A. App. A1672. When Lilly's counsel sought to address the "quantity effect" theory during the hearing on class certification, Judge Weinstein stated that the theory "is not going anyplace." C.A. App. A1695.

Plaintiffs' theory of causation focused on reliance by physicians rather than by the TPPs themselves. App. 391a. Petitioners were not in a position to claim that they themselves had been defrauded, because they continued to pay for Zyprexa even after the alleged misrepresentations had been revealed. *See* C.A. App. A1974 ("Strong evidence that [TPPs] were not defrauded is provided by the fact that most of the third-party plaintiff representatives still maintain Zyprexa on their formularies and continue to pay for the drug, as they have in the past.").

In ruling on the class certification motion, the district court found that:

- Physicians choose a course of treatment for a patient by weighing information "from a variety of different sources, . . . and factors specific to their individual patients, as well as pharmaceutical marketing from manufacture[r]s and competitors." App. 213a-14a.

- Because patients respond differently to different SGAs, which medication will work best for a particular patient is often unknown until he or she tries it, and "clinical decision-making about psychotropic medications almost inevitably is based on trial and error." App. 90a, 251a-52a

- Some doctors were not misled at all by Lilly's alleged misstatements. App. 245a-46a; C.A. App. A1996-97.[2]

Despite these findings, the district court certified a class of TPPs for the RICO claim based solely on the excess price theory.[3] Judge Weinstein concluded

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[2] Even if a particular physician was misled, TPPs may not have suffered any economic injury because some alternative treatments cost more than Zyprexa. For example, Abilify (another SGA) was more expensive than Zyprexa, and Seroquel (also an SGA) was more expensive for patients with schizophrenia *See* App. 169a, 257a.

[3] The district court denied plaintiffs' requests to certify a class of individual payors and to certify their claims under state consumer protection laws. App. 16a

that common issues predominated, as required by Federal Rule of Civil Procedure 23(b)(3), because "'[t]he only difference among third-party payors is how much of the total overcharge each shall receive in damages.'" App. 16a. The district court concluded that causation could be established on a class-wide basis by general proof "because the alleged fraud was 'directed through mailings and otherwise at doctors who relied.'" *Id.* The district court concluded that injury could be established on a class-wide basis by general proof because, "'[a]ssuming fraud leading to a price differential has been established, damages may be estimated based on the difference between what was paid for Zyprexa and the actual value of the product.'" *Id.*

After ruling on the class certification motion, the district court certified its order denying summary judgment for interlocutory appeal under 28 U.S.C. § 1292(b). *Id.* The Second Circuit granted Lilly's petition for leave to appeal both the denial of summary judgment under § 1292(b) and the class certification decision under Rule 23(f). App. 17a.

D. The Second Circuit's Decision

The Second Circuit unanimously reversed the class certification order, vacated the summary judgment order, and remanded for further proceedings. App. 29a-30a. The court of appeals held that a class could not be certified under either the excess price theory or the quantity effect theory, because neither but-for nor proximate causation could be established by generalized proof. App. 22a-28a. The court also held that Lilly was entitled to summary judgment on petitioners' excess price

theory because the chain of causation was too attenuated to meet the proximate causation requirement. App. 29a. The court concluded that the quantity effect theory involves a less attenuated chain of causation, and remanded for the district court to consider in the first instance whether that theory may be viable in an individual case. *Id.*

In analyzing but-for and proximate causation, the Second Circuit expressly recognized that reliance is not an element of a RICO claim. App. 20a (discussing *Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639 (2008)).[4] In this case, however, petitioners needed evidence of reliance because their own theories of causation depended upon it. App. 21a. As the court of appeals explained:

> [W]hile reliance may not be an element of the [RICO] cause of action, there is no question that in this case the plaintiffs allege, and must prove, third-party reliance as part of their chain of causation. Plaintiffs allege an injury that is caused by physicians relying on Lilly's misrepresentations and prescribing Zyprexa accordingly. Because reliance is a necessary part of

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[4] Although *Bridge* held that reliance is not an element of a RICO claim, the Court recognized that, "[i]n most cases, the plaintiff will not be able to establish even but-for causation if no one relied on the misrepresentation." 553 U.S at 658-59; *see also id.* ("Of course, none of this is to say that a RICO plaintiff who alleges injury "by reason of" a pattern of mail fraud can prevail without showing that *someone* relied on the defendant's misrepresentations.") (emphasis in original).

> the causation theory advanced by the plaintiffs, we must ask whether reliance can be shown by generalized proof.

Id.

1.a. The Second Circuit held that the district court had abused its discretion in certifying a class because the "excess price theory is not susceptible to generalized proof with respect to either but-for or proximate causation." App. 22a. In addressing but-for causation, the court of appeals applied circuit precedent holding "that reliance on a misrepresentation made as part of a nationwide marketing strategy 'cannot be the subject of general proof.'" *Id.* (quoting *McLaughlin*, 522 F.3d at 223). The district court's attempt to distinguish *McLaughlin* failed. App. 23a. Moreover, because "prescribing doctors do not generally consider the price of a medication when deciding what to prescribe for an individual patient[,] [a]ny reliance by doctors on misrepresentations as to the efficacy and side effects of a drug . . . was not a but-for cause of the price that TPPs ultimately paid for each prescription." *Id.* The court of appeals also held that, '[e]ven assuming but-for causation, plaintiff's theory of liability does not permit proximate cause to be shown by generalized proof." App. 23a.

The court of appeals held that the chain of causation between Lilly's alleged misrepresentations to physicians and the price paid by TPPs was too attenuated because "'the conduct directly causing the harm was distinct from the conduct giving rise to the fraud.'" App. 24 (quoting *Hemi Group, LLC v. City of New York*, 130 S. Ct. 983, 990 (2010)). Under the

excess price theory, TPPs alleged that they were injured by the price of Zyprexa, but Lilly's setting of Zyprexa's price was separate and distinct from the alleged misrepresentations to physicians. Moreover, the court noted, the ultimate price of Zyprexa is affected by negotiations over price and rebates between Lilly, TPPs, and PBMs. *Id.* Thus, the court concluded that the excess price theory fails because it "'rests on the independent actions of third and even fourth parties,' as physicians, PBMs, and PBM Pharmacy and Therapeutics Committees all play a role in the chain between Lilly and TPPs." App. 24a (quoting *Hemi*, 130 S. Ct. at 992) (internal citation omitted).

Even if the TPPs had alleged that they relied on the alleged misrepresentations, class certification would not have been appropriate. "Because only the TPPs were in a position to negotiate the price paid for Zyprexa, . . . the only reliance that might show proximate causation with respect to price is reliance by the TPPs, not reliance by the doctors." App. 24a. Thus, even if the TPPs had relied, their RICO claims could not be tried on a class-wide basis because an individualized inquiry would be required in light of the "evidence that at various times, individual TPPs began to request rebates from Lilly or restrict usage of Zyprexa for some indications." App. 24a-25a.

In addition, "[e]ven after the side effects of Zyprexa became publicly known, . . . most TPPs continued to pay the full price when Zyprexa was prescribed to treat symptoms of schizophrenia, even as payment for other indications was limited." App. 25a. The court of appeals concluded that, "[b]ecause these varying actions prompt questions about why

certain TPPs negotiated Zyprexa's price where others didn't, and why approval of Zyprexa for some indications was limited by some TPPs, generalized proof of reliance by doctors cannot complete the causation chain." *Id.*

b. Having rejected the theory on which the class was certified, the Second Circuit then considered whether it could affirm the class certification decision based on the quantity effect theory. App. 25a-28a. After noting that plaintiffs had abandoned this theory in the district court (App. 25a), the court of appeals decided that, even if the theory had not been abandoned, it could not support class certification because it "suffers from many of the same faults as the excess price theory." App. 26a.

Plaintiffs could not establish but-for causation by generalized proof because "the evidence showed that at least some doctors were not misled by Lilly's alleged misrepresentations, and thus would not have written 'excess' prescriptions." App. 27a. That evidence "makes general proof of but-for causation impossible." *Id.*

Proximate cause also could not be established through generalized proof, because there are many factors other than the alleged misrepresentations that could have caused the physician to prescribe Zyprexa. App. 26a-27a. As the Second Circuit observed, "[a]n individual patient's diagnosis, past and current medications being taken by the patient, the physician's own experience with prescribing Zyprexa, and the physician's knowledge regarding the side effects of Zyprexa are all considerations that would have been taken into account in addition to the alleged misrepresentations distributed by Lilly."

App. 27a. As a result, because of the "nature of prescriptions," the quantity effect "theory of causation is interrupted by the independent actions of prescribing physicians, which thwarts any attempt to show proximate causation through generalized proof." App. 26a.

Moreover, plaintiffs could not establish injury—another element of their RICO claim—by generalized proof. App. 27a. A TPP is injured by the alleged misrepresentations only if it would have paid for no medication or a less expensive medication instead of the "excess" Zyprexa prescriptions. If, but for the alleged fraud, a physician would have prescribed an equally or more expensive drug, then the TPP suffered no economic injury by paying for Zyprexa. According to the court of appeals, "Plaintiffs have not presented any evidence to show that, had Zyprexa not been prescribed, no medication would have been prescribed, nor that possible alternatives, such as antidepressants, would have been less expensive than Zyprexa." *Id.*

The Second Circuit concluded that "[a]ll of these variables show that the quantity effect theory is no more demonstrable with generalized proof than the excess price theory." App. 28a.

2. The Second Circuit then addressed the denial of Lilly's motion for summary judgment, and concluded that Lilly was entitled to summary judgment under the excess price theory. App. 28a-29a. The court explained that, "[a]fter *Hemi Group*, it is clear that plaintiffs' overpricing theory is too attenuated to 'meet RICO's requirement of a direct causal connection between the predicate offense and

the alleged harm.'" App. 29a (quoting *Hemi*, 130 S. Ct. at 990).

The court of appeals did not decide whether Lilly was entitled to summary judgment under the quantity effect theory. Instead, it remanded the case, concluding that the chain of causation was "less attenuated" for the quantity effect theory, and therefore "while that theory cannot support class certification, it is not clear that the theory is not viable with respect to individual claims by some TPPs and other purchasers." App. 29a.

REASONS FOR DENYING THE PETITION

II. The Petition Does Not Warrant This Court's Review.

The Second Circuit's decision does not conflict with any decision of another court of appeals, or with decisions of this Court. Nor does the court of appeals' decision prevent a TPP from recovering for healthcare fraud if it can offer appropriate proof under a valid legal theory. Indeed, the Second Circuit has remanded this case to allow the district court to consider whether individual TPPs can pursue RICO claims based on one of petitioners' two theories. Further review is not warranted.

A. There Is No Circuit Split.

Petitioners do not contend—for good reason—that the Second Circuit's decision conflicts with decisions of other courts of appeals. The only court that has certified a class of TPPs in a civil RICO case on an "excess price" theory was the district court in this case. The Second Circuit's decision reversing the district court is in accord with multiple decisions,

from both courts of appeals and district courts, that have rejected TPP claims like those in this case.

As petitioners acknowledge (Pet. 30 n.13), the Eleventh Circuit recently rejected similar RICO claims brought by TPPs. *See Ironworkers Local 68 & Participating Employers Health & Welfare Funds v. AstraZeneca Pharm. LP*, 634 F.3d 1352 (11th Cir. 2011). In *Ironworkers Local 68*, TPPs alleged a RICO violation based on AstraZeneca's marketing of Seroquel, an antipsychotic medication that competes with Zyprexa. The district court dismissed the claim on the ground that the TPPs did not adequately allege proximate causation. *Id.* at 1358. The district court, like the Second Circuit in this case, held that the alleged chain of causation was too attenuated. *Id.* The Eleventh Circuit affirmed the dismissal on the ground that the TPPs had not adequately alleged a "plausible economic injury." *Id.* at 1364. The asserted injury was inadequate because TPPs had not alleged that the amount they paid was greater than the amount they collected in premiums to compensate for the risk of paying for fraudulent prescriptions. *Id.* Judge Martin agreed with the result, but would have affirmed on the ground that the alleged chain of causation was too attenuated. *Id.* at 1370.[5]

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[5] Petitioners provide no support for their assertion that the Eleventh Circuit's decision has "deepened the confusion in the lower courts on the ability of third-party payors to recover for health-care fraud" Pet. 30 n.13. Multiple judicial decisions holding that a claim is not viable generally decrease uncertainty over the viability of a claim. The fact that courts of appeals have held that TPPs' claims fail for multiple reasons (continued...)

Similarly, the Ninth Circuit has affirmed the dismissal of RICO claims brought by TPPs. *See UFCW Cent. Pa. & Reg'l Health & Welfare Fund v. Amgen, Inc.*, 400 Fed. Appx. 255, No. 09-56118, 2010 WL 4128490 (9th Cir. Oct. 21, 2010) (unpublished). The Ninth Circuit noted that the chain of causation underlying the RICO claim "involved at least four independent links," including the TPPs' decision to cover the medication at issue and physicians' decisions to prescribe it. *Id.* at 257. The Ninth Circuit concluded that "[t]his causal theory is too attenuated to satisfy the Supreme Court's proximate causation requirement in the RICO context." *Id.* (citing *Hemi*, 130 S.Ct. at 989). As a result, "the complaint failed to plead a cognizable theory of proximate causation that links [defendant's] alleged misconduct to [TPPs'] alleged injury." 400 Fed. Appx. at 257 (citing *Bridge*, 553 U.S. at 654–55).

Although petitioners do not contend that there is a split in the circuits, they cite two decisions in which courts of appeals affirmed settlements in class actions involving TPPs, and assert that "presumably" these cases would have come out differently under the Second Circuit's decision. Pet. 28-31 (discussing *In re Synthroid Mktg. Litig.*, 264 F.3d 712 (7th Cir. 2001); *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516 (3d Cir. 2004)). This assertion is unpersuasive.

In *Synthroid*, the case settled and the only issues on appeal involved the sufficiency of the settlement.

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does not indicate "confusion," but simply that courts have discerned more than one flaw in these claims.

The Seventh Circuit did not address whether the RICO claim was properly certified as a class action, whether the chain of causation underlying the "excess price" theory was too attenuated, or any other issued decided by the Second Circuit.[6]

The Third Circuit's decision in *Warfarin* considered a class certified solely for settlement purposes that involved antitrust and state consumer fraud claims—no RICO claims were asserted. 391 F.3d at 529. In affirming the settlement, the Third Circuit held that it was "key" that the class was certified for settlement purposes only because a lesser standard applied in that circumstance. *Id.* The court of appeals' statement that the TPPs had been injured by paying "supracompetitive prices" does not conflict with the Second Circuit's decision because the court made this statement in rejecting an argument that the TPPs lacked antitrust standing. *Id.* at 531. Paying supracompetitive prices is, of course, a quintessential antitrust injury.

Contrary to petitioners' contention, there is no basis for presuming that their claims would have come out differently under *Synthroid* and *Warfarin*. Pet. 30. Both *Synthroid* and *Warfarin* involved

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[6] Nor does the Second Circuit's decision conflict with the district court's decision in *Synthroid*. *See* 188 F.R.D. 287 (N.D. Ill. 1999). The district court did not hold that the plaintiffs could prove proximate causation by generalized proof. Instead, it certified a class to determine whether the defendant had violated RICO. *Id.* at 292-93. If a violation were established, the court would then decide whether proximate causation could be proved on a class-wide basis, or whether an individualized inquiry was required. *Id.*.

settlements, and neither case decided any of the issues decided by the Second Circuit. Recent decisions from the District of New Jersey disprove petitioners' assertion that courts in the Third and Seventh Circuits will likely reach conflicting decisions based on *Warfarin* and *Synthroid*. *See District 1199P Health & Welfare Plan v. Janssen, L.P.*, No. 10-2021, 2011 WL 1086004 (D.N.J. Mar. 21, 2011); *In re Schering Plough Corp. Intron/Temodar Consumer Class Action*, No. 2:06-CV-5774, 2010 WL 2346624 (D.N.J. June 9, 2010).

In *District 1199P*, for example, TPPs brought a RICO claim against Janssen based on its allegedly improper promotion of Risperdal, an SGA that competes with Zyprexa. 2011 WL 1086004, at *1. The TPPs' claim in *District 1199P* was virtually identical to petitioners' claim in this case. The court distinguished *Warfarin* because that case involved antitrust claims, not RICO claims. *Id.* at *8. Relying on the Second Circuit's decision in this case, the court held that the allegations of proximate causation were too attenuated and dismissed the claims. *Id.* at *10-11.[7]

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[7] Other district courts have rejected similar RICO claims brought by TPPs. *See, e.g., S. Ill. Laborers' & Employees Health and Welfare Fund v. Pfizer Inc.*, No. 08-cv-5175, 2009 WL 3151807 (S.D.N.Y. Sept. 30, 2009); *In re Actimmune Mktg. Litig.*, 614 F. Supp. 2d 1037 (N.D. Cal. 2009). Federal courts have also rejected fraud claims under state law based on similar allegations by TPPs. *See, e.g., Zafarana v. Pfizer, Inc.*, 724 F.Supp.2d 545 (E.D. Pa. 2010); *Pa. Employee Benefit Trust Fund v. Zeneca, Inc.*, 710 F.Supp.2d 458 (D. Del. 2010); *Cent. Reg'l Employees Benefit Fund v. Cephalon, Inc.*, No.09-3418, 2010 WL 1257790 (D.N.J. Mar. 29, 2010). The district court (continued...)

In sum, the Second Circuit's decision does not conflict with any decision of another court of appeals. To the contrary, the lower courts have consistently rejected this type of claim. Further review is unwarranted.

B. There Is No Conflict With This Court's Decisions.

1. The Second Circuit's Decision Does Not Conflict With This Court's Decision in *Bridge*.

In the absence of a circuit conflict, petitioners' primary argument is that the Second Circuit's decision conflicts with this Court's decision in *Bridge* on the issue of proximate causation under RICO. Pet. 17-25.[8] The Second Circuit cited and relied on *Hemi*, which is this Court's most recent decision addressing proximate causation under RICO. Petitioners contend that the Chief Justice's partial opinion for the Court in *Hemi* cannot be reconciled with the Court's prior decision in *Bridge*, and that the Second Circuit therefore erred by relying on *Hemi*. Petitioners' argument fails because there is no conflict between *Hemi* and *Bridge*.

Petitioners argue that the Second Circuit's decision conflicts with *Bridge* in two ways. *First*, petitioners contend that *Bridge* adopted

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decisions cited by petitioners (Pet. 30 n.12) are inapposite because they involve settlements, antitrust claims, or both

[8] *Bridge* did not address class certification or but-for causation, and petitioners do not assert a conflict on those issues.

"foreseeability" as the test for proximate causation under RICO, and that "[t]he Second Circuit failed even to acknowledge that governing standard." Pet. 18-19. *Second*, petitioners argue that the court of appeals imposed a first-party reliance requirement despite *Bridge*'s holding that reliance was not an element of a civil RICO claim. *Id.* at 16, 20. Both arguments lack merit.

1. Contrary to petitioners' assertion (Pet. 17-25), *Bridge* did not adopt a foreseeability standard for proximate causation under RICO. The question presented in *Bridge* was whether a plaintiff must allege first-party reliance as an element of a RICO claim. 553 U.S. at 641-42. The Court held "that a plaintiff asserting a RICO claim predicated on mail fraud need not show, either as an element of its claim or as a prerequisite to establishing proximate causation, that it relied on the defendant's alleged misrepresentations." *Id.* at 661.

In reaching this decision, the Court reiterated its prior holdings that proximate causation requires a "direct relationship" between the predicate acts and the alleged injury. 553 U.S. at 657 (citing *Holmes v. Sec. Investor Prot. Corp*, 503 U.S. 258, 268 (1992); *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 461 (2006)). The court concluded that this standard was met because the alleged injury was a direct result of the fraud. *Id.* at 658. The Court also stated that "[i]t was a foreseeable and natural consequence of petitioners' scheme to obtain more liens for themselves that other bidders would obtain fewer liens." *Id.* But the Court did not state—as petitioners argue—that the injury was a direct result of the fraud *because* it was foreseeable. Had the

Court thought that foreseeability was sufficient to establish a "direct relationship," it would have had no need to examine whether the causal chain was more direct in *Bridge* than in *Holmes* and *Anza*, two cases in which proximate cause was lacking. *Id.*

In order to have adopted a foreseeability standard in *Bridge*, the Court would have needed to overrule *Anza*. In *Anza*—a decision issued just two Terms before *Bridge* in which seven Justices joined the Court's opinion—there was no dispute that the alleged injury was foreseeable. The plaintiffs alleged that the purpose of the fraud was to injure them by luring away their customers. 547 U.S. at 454. The dissent would have held that the complaint adequately alleged proximate causation because the injury was "not only foreseeable, but the *intended* consequences of the defendant's unlawful behavior." *Id.* at 470 (Thomas, J., concurring in part and dissenting in part). The Court, however, rejected this approach and held that the claim failed because it did not adequately allege a direct relationship between the alleged fraud and injury. *Id.* at 457. Nothing in *Bridge* indicates that the Court was overruling *Anza*. To the contrary, the Court distinguished its holding in *Anza*. *Bridge*, 553 U.S. at 657-59. If the Court had thought that it was unanimously overruling a recent decision joined by seven Justices, surely it would have said so.

In *Hemi*, no member of this Court took the position that *Bridge* adopted foreseeability as the governing standard for proximate causation under RICO. The Chief Justice's partial opinion for the Court concluded that the Court's previous decisions—in particular, *Anza*—rule out

foreseeability as a test for proximate causation. *See* 130 S. Ct. at 991. The Chief Justice's opinion noted that the dissent in *Anza* would have found proximate causation based on foreseeability, "[b]ut the dissent there did not carry the day, and no one has asked [the Court] to revisit *Anza*." *Id.*

Nor did the dissenting Justices in *Hemi* take the position that *Bridge* had adopted foreseeability as the governing standard for proximate causation. *Id.* at 995-1000 (Breyer, J., dissenting). Rather than arguing that *Bridge* had adopted a foreseeability standard for proximate causation, the dissent argued that the Court should adopt this standard and that—in the dissent's view—the Court's prior decisions do not foreclose it. *Id.* at 998.[9]

Even if this Court had adopted a foreseeability standard for proximate causation in *Bridge*, that standard would not have altered the Second Circuit's ruling on class certification in this case. The court of appeals held that petitioners could not proceed as a class because neither but-for nor proximate causation could be established by generalized proof. The foreseeability standard does not address but-for causation at all. Moreover, *Bridge* did not address whether generalized evidence, rather than individualized evidence, can be used to prove proximate causation. Thus, petitioners' claims could

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[9] The dissent in *Hemi* states that the Court held that the harms in *Bridge* were foreseeable, *see* 130 S. Ct. at 1000, but the dissent does not state—as petitioners argue—that the Court held in *Bridge* that proximate causation was established *because* the harms were foreseeable

not be certified even if *Bridge* had adopted a new standard of proximate causation.

2. Petitioners are also incorrect to argue that the Second Circuit's decision conflicts with *Bridge* by requiring petitioners to establish that they relied on misrepresentations. Pet. 16, 20. The Second Circuit did not impose a first-party reliance requirement. To the contrary, it expressly stated that this Court in *Bridge* "held that a plaintiff alleging a RICO mail fraud is not required to show first-person reliance." App. 20a.

In analyzing the "excess price" theory, the court of appeals considered it significant that the TPPs had not relied on the alleged misrepresentations. App. 24a. But the TPP's lack of reliance was important because of the nature of the plaintiffs' excess price theory (that the injury is caused by the *price* of Zyprexa) and the particular facts of this case, not because RICO requires first-party reliance. The facts of this case showed that the alleged misrepresentations would not have affected the price of Zyprexa even if prescribing physicians relied on them, and therefore the court properly concluded that the "excess price" theory failed without evidence of TPPs' reliance. App. 24a ("Because only the TPPs were in a position to negotiate the price paid for Zyprexa, . . . the only reliance that might show proximate causation *with respect to price* is reliance by the TPPs, not reliance by the doctors.") (emphasis added).

The court of appeals' treatment of the "quantity effect" theory refutes petitioners' assertion that the court imposed a first-party reliance requirement. The chain of causation underlying that theory also

involves third-party reliance, App. 26a, and therefore would have failed as a matter of law if the court had required first-party reliance. But the court did not hold that the "quantity effect" theory failed. App. 29a. Instead, it stated that, although "general proof of but-for causation" was "impossible," App. 27a, it was "not clear" whether a quantity theory might not be viable in an individual case, and remanded the case for further proceedings on that issue, App. 29a.

2. There is No "Confusion" Over The Governing Standard For Proximate Causation.

Petitioners argue that that Court should grant the petition to resolve the "confusion" over the governing standard for proximate causation under RICO. Pet. 22-25. Petitioners assert that confusion exists, but they do not cite a single case in which a court thought that *Bridge* and *Hemi* were in conflict, much less a case in which the court expressed confusion over the governing standard for proximate causation under RICO. The absence of support for petitioners' assertion that confusion exists provides further proof that petitioners have misread *Bridge*. It also demonstrates that there is no confusion to be resolved.

Petitioners themselves did not perceive any conflict between *Bridge* and *Hemi* until they filed their petition for certiorari. In petitioning the Second Circuit for rehearing, petitioners noted that "[t]he *Hemi* Court took pains to confirm that *Hemi* did not overturn or otherwise conflict with the Court's prior holding in *Bridge*." Reh'g Pet. at 11. Rather than arguing that the court had applied the

wrong standard, petitioners argued that the excess price theory was viable under *Holmes*, *Anza*, *Bridge*, and *Hemi*, and therefore the panel's decision was contrary to all of those decisions. *Id.* at 9.

Similarly, petitioners did not argue in the courts below that *Bridge* adopted foreseeability as the governing standard for proximate causation. Petitioners' rehearing petition discussed at length the governing standard for proximate causation. Reh'g Pet. 8-12. It did not argue (as petitioners do now) that foreseeability is the governing standard. *Id.* at 10-11. Instead, petitioners acknowledged that the Court has consistently required a "direct relationship" between the fraud and the injury. *Id.* at 8-12 (discussing *Holmes*, *Anza*, *Bridge*, and *Hemi*)

In short, there is no "confusion" in the lower courts, let alone a circuit split, concerning the standard for proximate causation under RICO. Further review is not warranted.

C. Petitioners Overstate The Effects Of The Second Circuit's Decision On Third Party Payors.

Petitioners assert that the Second Circuit's decision "denies . . . private health-insurance providers a federal remedy for health-care fraud that results in inflated prices for treatment." Pet. 26. Petitioners further assert that the Second Circuit's decision reaches an "irrational[]" result by permitting the government to recover for losses caused by fraudulent marketing, while preventing private TPPs from doing the same. *Id.* Both assertions are incorrect.

1. The Second Circuit's decision does not leave TPPs without remedies for healthcare fraud. As petitioners acknowledge (*see* Pet. 27 n.10), the court of appeals' decision does not rule out the possibility that TPPs can proceed individually under the quantity effect theory, if they offer more than "general proof" of but-for causation. App. 27a, 29a-30a. Indeed, the Second Circuit remanded this case to the district court for further proceedings on that theory. App. 29a-30a. Petitioners nevertheless assert that the Second Circuit's decision sounds a "death knell" for the litigation because it is "infeasible" for TPPs to litigate claims individually. Pet. 27 n.10. That assertion is demonstrably incorrect. Not only is it feasible for TPPs to litigate claims of this kind individually, TPPs have actually done so.

For example, in litigation by TPPs against Pfizer concerning its promotion of Neurontin, the district court, like the Second Circuit in this case, held that causation required an individualized inquiry and therefore a class of TPPs could not be certified. *In re Neurontin Mktg. Sales Practices & Prods. Liab. Litig.*, 257 F.R.D. 315, 333 (D. Mass. 2009).[10] Thereafter, multiple TPPs litigated their claims

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[10] The district court recently denied the TPPs' motion to certify a subclass involving prescriptions for a specific off-label indication, noting that even for this subclass a "granular doctor-by-doctor analysis" would be needed "to differentiate those prescriptions that were caused by fraud from those that were attributable to non-fraudulent off-label marketing or other independent factors." *In re Neurontin Mktg. & Sales Practices Litig.*, No 04-CV-10981, 2011 WL 1882870, at *5. (D Mass. May 17, 2011)

individually. The district court granted summary judgment for Pfizer against some but not all plaintiffs. *In re Neurontin Mktg. & Sales Practices Litig.*, 677 F. Supp. 2d 479, 485 (D. Mass. 2010). After denying a motion for summary judgment on claims brought by Kaiser Foundation Health Plan, the case went to trial. *Id.* The jury awarded Kaiser $47 million (later trebled to $142 million) on its RICO claim, and the court awarded Kaiser $42 million in restitution on its state-law fraud claim. *In re Neurontin Mktg. & Sales Practices Litig.*, 748 F. Supp. 2d 34, 38 (D. Mass. 2010).

In addition, the Second Circuit's decision does not prevent TPPs from bringing claims against pharmaceutical manufacturers if they have proof they relied on alleged misrepresentations by the manufacturer. Indeed, the Second Circuit has refused to dismiss claims by TPPs alleging that misrepresentations were made directly to them; that they relied on those misrepresentations in deciding to pay for a drug; and that, had they known the truth, they would not have paid for the product. *See Desiano v. Warner-Lambert Co.*, 326 F.3d 339 (2d Cir. 2003). Petitioners did not, and could not, make those allegations here because they continue to pay for Zyprexa.

In short, rather than denying TPPs a federal remedy for health-care fraud, the Second Circuit simply declined to recognize the validity of an "excess price" theory that has been rejected by other courts.

2. The Second Circuit's decision does not irrationally favor the federal government over TPPs. As petitioners acknowledge, the federal government's "recovery" was made by imposing criminal fines and

through settlement of civil claims brought under a different statute–the False Claims Act ("FCA"), 31 U.S.C. §§ 3729-3733. Pet. 27. The government did not assert any RICO claims against Lilly, and the TPPs do not have a private right of action under the FCA. There is nothing irrational about a situation in which the federal government can impose criminal fines and bring civil claims under one statute (the FCA), while private TPPs cannot maintain a class action under a different statute (RICO). Moreover, the Second Circuit's decision does not foreclose an individual TPP from seeking to litigate its RICO claims under the "quantity effect" theory, or from litigating claims that it was defrauded. Nor does the decision address the viability of TPP's state law claims.[11]

In sum, petitioners' contentions that the Second Circuits decision denies TPPs a remedy for healthcare fraud, and irrationally favors the federal government over TPPs, lack merit.

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[11] Plaintiffs' amici argue that unless TPPs can bring claims against pharmaceutical companies, those companies will have an economic incentive to engage in fraudulent marketing. Becker Br. at 11-17. But as explained above, the court of appeals' decision does not foreclose TPPs from bringing a variety of claims Other laws—including, in particular, federal criminal law—provide additional strong deterrents against fraud

D. The Second Circuit Correctly Held That Petitioners Could Not Establish Proximate Causation Under The "Excess Price" Theory.

"'When a court evaluates a RICO claim for proximate causation, the central question it must ask is whether the alleged violation led directly to the plaintiff's injuries.'" *Bridge*, 553 U.S. at 654 (quoting *Anza*, 547 U.S. at 641). A court must focus on this issue because proximate causation under RICO requires a "direct relation" between the injury asserted and the RICO violation. *See Holmes*, 503 U.S. at 268 (requiring "some direct relation between the injury asserted and the injurious conduct alleged").

This Court has twice held that the directness requirement was not satisfied where the alleged injury was directly caused by conduct distinct from the alleged RICO violation. In *Anza*, the Court held that the lack of proximate cause was "clear" when Ideal (a steel company) alleged that it was directly injured by the prices set by National (a competing steel company). 547 U.S. at 457-62. Ideal alleged that it was injured because it lost business to National when National lowered its prices, and that National was able to lower its prices by not paying state taxes and then concealing its tax evasion by violating RICO. *Id.* at 457-58. The Court recognized that Ideal alleged that it was directly harmed by the lowering of prices, but held that Ideal nonetheless failed to establish proximate causation because the lowering of prices was distinct from the RICO violation. The Court explained: "The cause of Ideal's asserted harms, however, is a set of actions (offering

lower prices) entirely distinct from the alleged RICO violation (defrauding the State)." *Id.* at 458.

In *Hemi*, the Court reaffirmed that RICO's "reach is limited by the 'requirement of a direct causal connection' between the predicate wrong and the harm." 130 S. Ct. at 994 (quoting *Anza*, 547 U.S. at 460). New York City alleged that it had suffered an injury (lost tax revenue) by reason of the defendants' RICO violation because defendants' failure to comply with the reporting requirements of the Jenkins Act allowed cigarette purchasers to avoid paying the City tax. *Id.* at 987-88. Holding that this allegation was insufficient to establish proximate causation, the Court explained:

> The City's claim suffers from the same defect as the claim in *Anza*. Here, the conduct directly responsible for the City's harm was the customers' failure to pay their taxes. And the conduct constituting the alleged fraud was Hemi's failure to file Jenkins Act reports. Thus, as in *Anza*, the conduct directly causing the harm was distinct from the conduct giving rise to the fraud.

Id. at 990.

In this case, the Second Circuit held that the chain of causation underlying the "excess price" theory was too attenuated for the same reason. Under this theory, TPPs seek treble damages under RICO for every prescription of Zyprexa by alleging that the injury results from paying too high a price.

But, as the Second Circuit held, the amount paid by any particular TPP depends both on the price set by Lilly and the amount, if any, of the rebate negotiated either by the TPP itself or the PBM in consultation with its P&T Committee on behalf of the TPP. App. 6a-10a, 24a. Because this conduct (setting and negotiating the price of Zyprexa) is distinct from the alleged mail fraud violations (misrepresentations to prescribing physicians), the Second Circuit held that "in this case 'the conduct directly causing the harm was distinct from the conduct giving rise to the fraud.'" App. 24a (quoting *Hemi*, 130 S.Ct. at 990).

Petitioners fault the Second Circuit for relying on *Hemi* but their criticism has no merit. Contrary to petitioners' assertion, the Chief Justice's opinion in *Hemi* did not attempt to overrule *Bridge*; it distinguished that case on the facts. *See* 130 S. Ct. at 992. The Court noted that, in *Hemi*, "[t]he City's theory of liability rests on the independent actions of third and even fourth parties." *Id.* In contrast, in *Bridge*, "there were 'no independent factors that account[ed] for [the plaintiff's injury." *Id.* Relying on *Hemi*, the Second Circuit drew the same distinction between the theory in *Bridge* and the excess price theory: "Plaintiffs' 'theory of liability rests on the independent actions of third and even fourth parties,' as physicians, PBMs, and PBM Pharmacy and Therapeutics Committees all play a role in the chain between Lilly and TPPs." App. 24a (quoting *Hemi*, 130 S. Ct. at 992).

Petitioners attempt to show that the chain of causation is not as attenuated as the Second Circuit held, but they do so by conflating the "excess price" and "quantity effect" theories. Pet. 18-19.

Petitioners seek to justify this approach by incorrectly asserting that the court relied on the same analysis for each of its rulings *Id.* at 18. The court of appeals not only analyzed the theories differently, but *reached different conclusions about their viability*. For the "excess price" theory, the court held that the chain of causation was too attenuated. But for the "quantity effect" theory, the court concluded that the chain of causation is "simpler" once "the variable of price" is removed. App. 26a. As a result, the court remanded the case to the district court for further proceedings because it was "not clear" whether Lilly was entitled to summary judgment on proximate causation under the quantity effect theory. App. 29a.

In sum, the Second Circuit correctly held that petitioners' alleged chain of causation was too attenuated under the "excess price" theory. The court reached this decision because, as in *Anza* and *Hemi*, the alleged injury under this theory was caused by conduct distinct from the alleged fraud.

III. The Petition Should Not Be Held For *Erica P. John Fund, Inc. v. Halliburton Co.*

Petitioners argue in the alternative that the petition be held pending the Court's resolution of *Erica P. John Fund, Inc. v. Halliburton Co.*, No. 09-1403 (argued Apr. 25, 2011). Pet. 31-34. This Court's decision in *Halliburton* will not affect the outcome of this case. Accordingly, the petition should not be held for *Halliburton*.

Halliburton presents two questions. *First*, whether "plaintiffs in private securities fraud actions

must at class certification not only satisfy the requirements set forth in *Basic v. Levinson*, 485 U.S. 224 (1988), to trigger a rebuttable presumption of fraud on the market, but must also establish loss causation by a preponderance of admissible evidence." Pet. Br. i. *Second*, whether the court of appeals "improperly considered the merits of the underlying litigation, in violation of both *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974), and Federal Rule of Civil Procedure 23, when it held that plaintiffs must establish loss causation at class certification to invoke the fraud-on-the-market presumption." *Id.*

Petitioners in *Halliburton* argue that the Fifth Circuit erred in requiring them to establish "loss causation"—an element of their securities-fraud claim—at the class-certification stage. *Id.* at 27-31. Respondent contends that the court of appeals correctly recognized that a defendant may rebut the fraud-on-the-market presumption by showing that the alleged misrepresentation did not lead to a distortion of the security's price. Resp. Br. 1-2. Because common issues predominate only if the fraud-on-the-market presumption applies, respondents argue that the price distortion issue is properly addressed at the class certification stage. *Id.* at 14-15.

This case, unlike *Halliburton*, does not involve securities fraud, and therefore is not subject to the fraud-on-the-market presumption recognized in *Basic*. Petitioners have acknowledged that the fraud-on-the-market presumption has no application to this case. Indeed, they sought to avoid review by the court of appeals by affirmatively disclaiming any

reliance on the *Basic* presumption. *See* Pl's Opp. to Pet. for Leave to Appeal at 12 (stating that petitioners "have eschewed the use of any such presumption").

Petitioners are correct to concede that the fraud-on-the-market presumption has no application to this case. The presumption applies only to efficient markets in which purchasers rely "on the integrity of the market price." *Basic*, 485 U.S. at 247-48. Both courts below agreed that the market for pharmaceutical products such as Zyprexa is not efficient. App. 6a-10a; *id.* at 98a, 212a, 284a. Consequently, the fraud-on-the-market presumption does not apply, and questions about how that presumption may be rebutted at the class certification stage are irrelevant to the outcome of this case.

According to petitioners, "that *Halliburton* involves a claim for securities fraud is of no moment, because loss causation in a securities-fraud action is closely analogous to the RICO causation issues involved here." Pet. 33-34. Contrary to petitioners' assertion, it *is* of moment that *Halliburton* involves a claim for securities fraud, because the *Basic* presumption applies to securities fraud claims. Moreover, the Second Circuit did not rely on the concept of "loss causation" or on any securities-fraud decisions. Indeed, petitioners' position on "loss causation" before the court of appeals was directly opposed to their position before this Court. *See* Pls.' Br. 34 ("loss causation" is "the wrong legal standard"); *id.* at 34-35 ("'loss causation' cannot be appropriately substituted for proximate cause in the RICO context"); *id.* at 35 ("neither the Supreme

Court nor Congress have adopted a requirement of 'loss causation' in the RICO context"); *id.* (loss causation "is a poor surrogate for proximate cause in the RICO setting.").

Petitioners nevertheless contend that this Court's decision in *Halliburton* could affect the outcome of this case because the Second Circuit based its class certification ruling on a determination that petitioners had failed to prove the merits of their claim. Pet. 33. Petitioners are incorrect. The Second Circuit did not hold that class certification was improper because petitioners' claims failed on the merits. To the contrary, the Second Circuit explicitly stated that a class could not be certified because causation could not be established by generalized proof. App. 22a ("Because we conclude that plaintiffs' excess price theory is not susceptible to generalized proof with respect to either but-for or proximate causation, class certification based on this theory was an abuse of discretion.").

Despite the court of appeals' clear statement of the basis for its holding, petitioners assert that the "opinion as a whole leaves no doubt" that the court actually based its class certification ruling on a different ground—that petitioners' claims fail on the merits. Pet. 33. Petitioners' assertion that the Second Circuit gave a false reason for its holding is without merit. The Second Circuit held that a class could not be certified because of the need for individualized evidence proving *both* but-for and proximate causation under *both* the excess price and quantity effect theory. App. 22a. The court's decision on summary judgment addressed *only* proximate causation under the excess price theory.

App. 28a. The court did not address but-for causation under the excess price theory, nor did it decide the merits of but-for or proximate causation under the quantity effect theory. *Id.* Thus, the court could not have denied class certification for any reason other than the reason it gave: because individualized evidence was necessary. App. 22a-28a.

Finally, regardless of what the Court holds in *Halliburton*, the Second Circuit in this case did not err by considering the merits of petitioners' claims. Unlike *Halliburton*, which is limited to review of a class certification decision, the appeal in this case also involved the denial of Lilly's summary judgment motion. As a result, it was entirely appropriate for the Second Circuit to consider the merits of petitioners' claims because the court was reviewing the denial of summary judgment in addition to the class certification decision.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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